SYARIKAT MACEY BERHAD

v.

NIGHTINGALE ALLIED SERVICES (SUED AS A FIRM) & 2 ORS.

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J
[ORIGINATING SUMMONS NO. 24-397-1994]
19 DECEMBER 1994

***CONTRACT**: Sale of land - Parties, property and price agreed upon - Variation of terms - No complete acceptance of terms of offer -Whether there was a substantial contract concluded.*

***LAND LAW**: Sale of land - Several titles endorsed with memorial "Malay Reservation" - Section 8 of the Malay Reservation Enactment FMS Cap. 142 prohibiting transfer of "Malay holding" to non-Malays - Whether land "Malay holding" if previously registered in name of Malay proprietor or co-proprietor - Whether land in question "Malay holding" - Whether any prohibition in the transfer to non-Malay respondents.*

***WORDS & PHRASES**: Section 2, Malay Reservation Enactment FMS Cap. 142 - "Malay holding".*

The applicants were the registered owners of a plantation held under 13 documents of title (the said land). The applicants indicated to the third respondent, who was a partner in the first respondent's firm which was engaged in the real estate agency business, that it intended to sell the said land. Consequently, the applicants wrote to the first respondent through their solicitors setting out the terms of offer for the sale of the said land (P8). On 10 November 1992 the second respondent's solicitors wrote to the applicant's solicitors informing them that their clients were the intending purchasers. A draft agreement was subsequently forwarded to the applicants' solicitors incorporating several new terms.

The second respondent's solicitors conducted a land search which revealed that a memorial expressing "Malay Reservation" was endorsed on 9 of the 13 titles. This endorsement resulted in an exchange of correspondence and further draft agreements were forwarded by the second respondent's solicitors to vary the terms of the agreement on *inter alia*, terms of payment and to include a condition precedent for removal of the endorsement or rectification of the register of title. The applicants' solicitors had explained that the transfer of the said land could be effected to a non-Malay even with the endorsement but upon the respondents' insistence on the condition precedent, the applicants refused to proceed with the sale contending that there was no concluded agreement. The respondents on the other hand argued that there was a concluded contract as the "3P's" i.e. parties, property and price, had been agreed upon.

Held:

[1] The term "Malay Holding" means that in order for s. 8 to apply, the land in the Malay Reservation must have first of all a Malay registered proprietor or co-proprietor. If there has been no such Malay registered proprietor or co-proprietor in such Malay Reservation land before, then there should be no prohibition in the transfer of such land to a non-Malay.

[2] Since, the said land has never been registered in the name of any Malay proprietor or co-proprietor, the memorial so entered on the affected titles is therefore erroneous. Though this may be so, but to insist upon such an error to be corrected prior to the completion or made a condition of sale, is certainly a major term that must be agreed upon by the parties, especially when this involves time, obligations and effort. In addition to this, the imposition of this condition must be viewed in the light that the said land can be transferred and registered in the name of the applicants even with such an endorsement.

[3] Though some salient points were agreed upon, but the fundamental term relating to title of the said land itself is in dispute. It is over simplifying matters by stating that once the "3 P's" (i.e.) parties, price and property are agreed upon, a substantial contract is concluded. These symbols in the "3 P's" may represent these and arising from these, are many other equally important and essential terms that must be agreed before an agreement can be said to be conclusive. This is a sale of a very large estate where the total purchase prices involves approximately RM24 million. The issue relating to title which also inter relates to the time for payment of the purchase price are fundamental issues which parties must agree upon before a contract can be considered concluded. In this case, these were not agreed upon by the parties and as such the purported agreement has not cyrstalised.

[Applicants' application allowed]

Cases referred to:
Lim Keng Seng v Yeo Ah tee [1983] 2 MLJ 39 ***(cit)***
Tan Hong Chit v Lim Kin Wan [1964] MLJ 113 ***(foll)***
SMIM (Malaysia) Sdn. Bhd. v Sanyo Murako International Co. Ltd [1992] 1 AMR 42 ***(dist)***

Legislation referred to:
Malay Reservation Enactment FMS Cap 142 SS.2, 6(vi), 8

For the applicant - Edward Kam, (Manjit Singh with him); M/s. Kam Woon Wah & Co.
For the 1st & 3rd respondent - Y.M. Sim; M/s. Othman Hashim & Co.
For the 2nd respondent - Jean Chong; M/s. Soo Thien Ming & Shahrizat

JUDGMENT

James Foong J:
The applicants are or were the registered owners of a plantation known as Sg. Tamu Estates which consists of approximately 800 acres of land, held under 13 documents of title, (for ease of reference, this Court shall refer this 800 acres of land as the said land).

On 3 February 1992, the applicants indicated to the third respondent, a partner in the first respondents' firm which were engaged in real estate agency business, that the applicants intended to sell the said land. The first respondents replied stating that they have a potential purchaser. Consequent to this, the applicants through their solicitors, M/s. Shearn Delamore & Co. (M/s. Shearn Delamore in short) wrote to the first respondents setting out the terms of offer for the sale of the said land. For the purpose of clarity, this Court shall refer to this letter of offer as P8. As the terms in P8 are important for the determination of the issues of this case, this Court hereby reproduce its exact contents.

19 October 1992

Nightingale Allied Services
Real Estate Agents
No. 5, Jalan 5/8
46000 Petaling Jaya

Dear Sirs,

Re: Sale of Sg. Tamu Estate, Batang Kali, Selangor Comprising of about 800 acres

We act for Syarikat MACEY Berhad and write with reference to the offer made by your client for the purchase of our clients' property abovementioned.

We have now instructions to reply to you as follows:-

Our clients are prepared to sell the above property at the price of Ringgit Thirty thousand (RM30,000) per acre subject to the following terms and conditions:-

(1) Sale of the property as a going-concern and therefore the purchaser will have to, *inter alia*, take over the workers employed in the estate. Our clients will not be responsible for any compensation/termination benefits etc.

(2) The sale and purchase, is subject to the approval of our clients' share holders at an Extraordinary General Meeting to be held and the Foreign Investment Committee of the Prime Minister's Department ("FIC").

(3) Ten per cent (10%) is payable on signing of the sale and purchase agreement which sum will be refunded free of interest if approvals mentioned in (2) above are not obtained within a period to be fixed.

(4) Balance of the purchase price is to be paid within a period of six (6) months or one (1) month of receipt of FIC approval, whichever is the later but extension for a further period of six (6) months will be granted if requested by the purchaser subject to the purchaser paying ten per cent (10%) interest on the balance purchase price.

(5) The other usual terms and conditions applicable to sale of estates.

Our clients are agreeable to a commission of two per cent (2%) to be paid as follows:-

(a) upon receipt of the approvals mentioned in item (2) above two per cent (2%) of the ten per cent (10%) received by our clients as deposit; and

(b) upon payment of the balance sum two per cent (2%) will be paid to you.

Please confirm that the terms above stated are acceptable to your client and let us have particulars of your clients so that the necessary sale and purchase agreement can be drafted.

Yours faithfully,

Shearn Delamore.

On 10 November 1992, a firm of Solicitors M/s. Soo Thien Ming & Shahrizat (M/s. Soo Thien Ming in short) acting for and on behalf of the second respondents wrote to M/s. Shearn Delamore informing them that their clients were the intending purchasers of the said land. In this letter, it was expressed that the purchase price of RM30,000 per acre was agreeable and so were conditions 2 and 3 of M/s. Shearn Delamore's letter. However, relating to the payment of the balance of the purchase price, M/s. Soo Thien Ming asserted that through the third respondent the applicants have agreed to a period of 12 months instead of 6. Further, in respect of condition 1 which relates to taking over of the estate workers employed in the said plantation, M/s. Soo Thien Ming expressed that they were obtaining instructions from their clients and will revert at a later date. Subsequent to this letter, M/s. Soo Thien Ming forwarded a draft agreement (hereinafter shall be referred to as the first draft agreement) to M/s. Shearn Delamore which did not include any terms relating to the taking over of the estate workers. But inserted into this draft agreement was the clause relating to the payment of the balance of the purchase price to be 12 months instead of 6.

Soon after the first draft agreement, on 25 November 1992, M/s. Soo Thien Ming wrote to M/s. Shearn Delamore informing that their search at the relevant land registry revealed that on 9 of the 13 titles, there was a memorial which expressed "Malay Reservation". The said solicitors were of the view that with this endorsement, transfer of the said land to their clients may not be possible; nevertheless, they sought clarification.

On 8 December 1992, M/s. Soo Thien Ming by letter proposed to M/s. Shearn Delamore that in view of the Malay Reservation endorsement on the 9 titles, the terms of the draft agreement should be changed. They suggested that;

(a) the removal of this endorsement should be a condition precedent.

(b) the deposit of 10% of the purchase price be paid to M/s. Shearn Delamore as stakeholder instead of the applicants until the endorsement is removed; and

(c) before completion of the sale, the condition precedent must be satisfied.

Again receiving no positive response from M/s. Shearn Delamore except that of "still awaiting instructions", M/s. Soo Thien Ming forwarded another draft agreement (hereinafter shall be referred to as the second draft agreement) to the applicants' said solicitors. In this second draft agreement, besides making the removal of the endorsement of Malay Reservation as condition precedent, it also required the applicants to obtain a declaration to revoke the endorsement by the Menteri Besar, and which declaration must be approved by Ruler of the State-in-Council, and that such a declaration must be gazetted before the balance of the purchase price was to be paid, and which payment shall only be made within 6 months after the last of the above conditions were fulfilled.

On 5 March 1993, M/s. Soo Thien Ming informed M/s. Shearn Delamore that they had received RM2.4 million from the second respondents, and as the applicants' solicitors refused to accept it, the same was banked into M/s. Soo Thien Ming's clients' account.

On 8 March 1993, M/s. Shearn Delamore replied to M/s. Soo Thien Ming, putting on record that there had been no offer and acceptance reached between the parties. They further ellaborated that since all terms and conditions in P8 were not accepted by the second respondents or their solicitors, the proposed terms contained in M/s. Soo Thien Ming's letters to them were considered as counter-offers by the second respondents on which, they were taking their clients' instructions.

On 17 and 18 May 1993 caveats were placed on the said land by the second respondents. Besides this, the third respondent also placed a caveat on one of the titles of the said land bearing Grant No. 37147 Lot 6374 Mukim of Batang Kali, District of Ulu Selangor, Selangor.

On 2 August 1993, Shearn Delamore wrote to M/s. Soo Thien Ming a rather short letter. In it they stated that their clients, the applicants "are prepared to consider the offer of RM35,000 an acre for the purchase of the above property." This drew a massive protest from the M/s. Soo Thien Ming as is evidenced from their letter dated 12 August 1993. After some heated exchange of letters between the said solicitors, M/s. Shearn Delamore finally wrote on 5 November 1993 to M/s. Soo Thien Ming stating that:

> we are now instructed by our client that they are prepared to proceed with their original offer on the terms and conditions set out in their letter of 19 October 1992 (P8).

This seems to have pacified all relevant parties, but unfortunately not for long. On 20 November 1993 M/s. Soo Thien Ming by letter formally accepted the applicants' above offer but, once again raised the endorsement of Malay Reservation on the documents of title to the said land. They now proposed either;

(a) the removal of this endorsement as a condition precedent or;

(b) a covenant on the applicant's part to apply to the Court to rectify the register of title by deleting this endorsement on the ground that it was erroneously entered.

Together with this letter, another draft agreement (hereinafter referred to as the third draft agreement) was attached.

On 10 January 1994, M/s. Shearn Delamore on behalf of the applicants commented on the third draft agreement. Primarily, it insisted on;

(a) the said land be sold without vacant possession since the estate workers were still residing thereon;

(b) the purchasers should only be the second respondents; (this arose in the third draft agreement where the second respondents attempted to insert the name of another company to be substituted as the purchasers);

(c) no first irrevocable option to purchase be granted to the second respondents in the event of the general meeting of the applicants in not approving this sale;

(d) any terms accommodating the second respondents' arrangement with their financiers to assist in the purchase of the said land should be deleted; in short the second respondents are responsible to pay within the stipulated time;

(e) and finally, on the question of Malay Reservation, the following were the exact comments:

> We are of the view that the restriction does not prohibit our client from dealing with the lands as the lands does not come within the definition of "Malay Holdings". As such this provision is to be deleted in toto. The lands are sold with the restriction and in the event that your client is not prepared to purchase the same subject to the same our client propose that negotiations determine forthwith.

M/s. Soo Thien Ming did not take long to reply, and on 28 January 1994, they insisted that though the applicants were unreasonable on some terms, but "the main problem is the appearance of the restriction of "Malay Reservation"". Nevertheless, they proceeded to insist that the applicants do "honour the concluded bargain by our clients acceptance of the offer, by agreeing to the execution of the formalised Sale & Purchase Agreement upon **reasonable** terms and conditions". Obviously, the applicants refused to abide, thus leading to this litigation.

It is the applicant's intention that no agreement was ever concluded between the parties in this case. Besides the issue of the Malay Reservation, there were also questions relating to the estate workers and the time limit for payment of the purchase price.

The respondents, particularly the second respondents on the other hand argued that since the "3'p's" were agreed upon, there is a concluded contract. Though some other terms may yet to be agreed by the parties, the Court can infer reasonable terms into the concluded contract in areas not agreed upon. The "3'p's" referred to by the second respondents' Counsel represent Parties, Property and Price. According to the second respondents, the Parties in this contract has been identified. They were the applicants as the vendors and the second respondents as the purchasers. In respect of Property to be sold, it was the said land. As for the Price, it was the agreed sum of RM30,000 per acre. To support this contention, the Federal Court decision of *Lim Keng Seng v. Yeo Ah Tee* [1983] 2 MLJ 39 was cited.

A careful perusal of the facts of this case reveals that after the offer contained in P8 was made, there was no complete acceptance of all the terms contained therein. Instead, the second respondents concentrated on the issue of the Malay Reservation. Other issues, such as the taking over of estate workers and the time for the payment of the balance of the purchase price, were left in abeyance. It was only after the applicants' reaffirmation of the offer in P8 on 5 November 1993 (after having terminated it earlier on 2 August 1993) that the second respondents immediately accepted all the terms contained therein. Therefore, if at all any agreement can be implied to have been reached, it may only have happened on 20 November 1993, the date when the second respondents' solicitors accepted all the terms in P8 in total. Before this, even the second respondents have in their statutory declaration supporting their entry of the caveats over the said land, declared that the parties were only "negotiating" for the purchase of the said land.

Immediately upon acceptance of the terms and conditions in P8, the second respondents solicitors raised the issue of the Malay Reservation once again. By their letter dated 28 January 1994, the second respondents seem to have held out this issue as "the main problem". With this "main problem" not being agreed upon, can it be a inferred that the parties have reached a concluded contract?

P8 raised no such term and condition relating to the issue of Malay Reservation. It was the second respondents who insisted on the settlement of this matter after accepting P8 on 20 November 1993. This subject matter is therefore a new term and condition; though discussed earlier, but that was before P8 was totally accepted by the second respondents. This new term obviously could not be agreed upon by the parties. The applicants have flatly rejected it, while the second respondents did not even consider purchasing the said land with such an endorsement unless, it was removed as a condition precedent. No attempts were contemplated by the second respondents in considering whether the said land could be transferred to them with such an endorsement.

On the issue of the Malay Reservation, the applicants' solicitors have explained that the transfer of the said land could be effected to a non-Malay even with such an endorsement. This is for reason that under s. 8 of the Malay Reservation Enactment FMS Cap. 142, which is applicable to Negeri Sembilan, Pahang, Perak and the Federal Territories, (hereinafter referred to as the said Act) states that, "no Malay holding shall be transferred, charged leased or otherwise disposed off to any person not being a Malay...". The term "Malay holding" is interpreted in s. 2 of the Act as, "any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation...". This means that in order for s. 8 to apply, the land in the Malay Reservation must have first of all, a Malay registered proprietor or co-proprietors. If there has been no such Malay registered proprietor or co-proprietors in such a Malay Reservation land before, then there should be no prohibition in the transfer of such land to a non-Malay.

This view seems to be similar to that adopted by the Federal Court in *Tan Hong Chit v. Lim Kin Wan* [1964] MLJ 113. It was held in this case that when a piece of land in the Malay Reservation area is registered in the name of a non-Malay who had acquired the land prior to the creation of the Malay Reservation, the non-Malay can transfer the land to any non-Malay, and any subsequent transfer or charge to a non-Malay can be affected without obtaining the approval of the Ruler-in-Council. Though the decision in this case was based on the Kelantan Malay Reservation Land Enactment of 1930, while our present case involves the Malay Reservation Enactment FMS Cap.142, it is the opinion of this Court that the underlying principle is still the same.

Proceeding from the above, it is also appropriate to highlight the other reason why the second respondents persisted on insisting on the removal of the endorsement of the Malay Reservation from both the register of titles and documents of title to the said land. Under s. 6(vi) of the said Act, the registering authority is not permitted to enter any memorial of such nature in the register of titles or on issue of documents of title "for any land of which the sole-proprietor is not a Malay or of which none of the co-proprietors are Malays" even though the land may be gazetted as Malay Reservation. Since, the said land has never been registered in the name of any Malay proprietor or co-proprietors, the memorial so entered on the affected titles is therefore erroneous.

It is the opinion of this Court that though this may be so, but to insist upon such an error to be corrected prior to the completion or made a condition to the sale, is certainly a major term that must be agreed upon by the parties, especially when this involves time, obligations and effort. In addition to this, the imposition of this condition must be viewed in the light that the said land can be transferred and registered in the name of the applicants even with such an endorsement.

The second respondents strenuously stressed on the fact, that since the salient points were agreed upon by the parties, a substantial agreement has been reached, and other reasonable terms in areas not agreed upon can be imported by the Courts to make the agreement effective. To support this, the case of *SMIM (Malaysia) Sdn. Bhd. v. Sanyo Murako International Co., Ltd.* [1992] 1 AMR 42 was cited. In this case, Shankar J adopted the principle that, once the parties have reached substantial agreement, a contract is concluded even though some other matters are required to be settled by further negotiations. In respect of such further matters, the Court will import reasonable terms in order to make the agreement effective. Though this may be the legal principle, but before it can be applied, a "substantial agreement" must first be agreed upon. In *SMIM's* case, the facts pointed towards a substantially concluded contract. There Sanyo Japan by various documents, which included a signed letter of intent, and followed by deeds and acts of allowing a local Malaysian company incorporated solely on the initiative of Sanyo Japan to distribute Sanyo goods in Malaysia for a substantial period of time, decided not to proceed to enter into a formal agreement with the local company. The Judge was obviously correct in arriving at the conclusion that a substantially concluded contract was in existence. However, in our case the circumstances are different. The fundamental question relating to title has yet to be agreed or not agreed upon at all. Under this set of situation, can it be said that a substantially concluded contract has been reached?

Again, the earlier cited case of *Lim Keng Siong v. Yeo Ah Tee* is a case in point, similar to that of *SMIM*. Here, both the vendor and the purchaser had virtually agreed on everything fundamental. It was the vendor's attempt to get out of the agreement that he proposed new terms on insisting that the deposit should be increased to 20% from the original 10%.

In view of the above and after considering all the facts in this case, this Court finds that the parties have not reached a concluded contract. Though some salient points were agreed upon, but the fundamental term relating to title of the said land itself is in dispute. The second respondents' Counsel may have over simplified matters by stating that once the "3Ps" (i.e.,) parties, price and property are agreed upon, a substantial contract is concluded. These symbols in the 3'P's may represent fundamentals in a contract but, within these and arising from these, are many other equally important and essential terms that must be agreed before an agreement can be said to be conclusive. This is a sale of a very large estate where the total purchase prices involves approximately RM24 million. The issue relating to title which

also inter relates to the time for payment of the purchase price are fundamental issues which parties must agree upon before a contract can be considered concluded. In this case, these were not agreed upon by the parties and as such the purported agreement has not crystalised.

This Court therefore allows:

(a) a declaration that there is no concluded contract for the sale of the said land between the applicants and second respondents;

(b) a declaration that no commission is payable to the first and third respondents by the applicants;

(c) that the Senior Assistant Registrar of this Court do proceed to hold an enquiry into damages (if any) caused by the caveats placed on the said land by the second and third respondents;

(d) that the respondents do pay the applicants cost.